

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

EAT RIGHT FOODS LTD.,

Plaintiff,

V.

WHOLE FOODS MARKET, INC. and
WHOLE FOODS MARKET SERVICES,
INC.,

Defendant.

Civil Action No.

**COMPLAINT FOR TRADEMARK
INFRINGEMENT, FALSE
DESIGNATION OF ORIGIN, AND
UNFAIR COMPETITION**

Jury Demanded

Plaintiff EAT RIGHT FOODS LTD for its complaint for trademark infringement, false designation of origin, and unfair competition against WHOLE FOODS MARKET, INC. and WHOLE FOODS MARKET SERVICES, INC., hereby alleges as follows:

PARTIES

1. Plaintiff Eat Right Foods Ltd. (“Eat Right Foods”) is a limited liability company organized under the laws of New Zealand, with a principal place of business in Nelson, New Zealand.

2. Defendant Whole Foods Market, Inc. is a corporation incorporated under the laws of the state of Texas. Defendant Whole Foods Market Services, Inc. is a corporation incorporated under the laws of the state of Delaware. On information and belief, Defendants Whole Foods Market, Inc. and Whole Foods Market Services, Inc. (collectively "Whole Foods")

COMPLAINT - 1

Civil Action No.
ERFD-6-1001P01 Complaint

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1 share a principal place of business at 550 Bowie St., Austin, TX, 78703. Whole Foods operates
 2 several hundred grocery stores throughout North America, including in this judicial district.

3 JURISDICTION AND VENUE

4 3. This court has subject matter jurisdiction over this dispute pursuant to 28 U.S.C.
 5 §§ 1331, 1338(a) and (b).

6 4. This court also has subject matter jurisdiction over this dispute pursuant to 28
 7 U.S.C. § 1332 as there is diversity of citizenship and the amount in controversy exceeds \$75,000
 8 exclusive of costs.

9 5. Venue is appropriate in this judicial district pursuant to 28 U.S.C. § 1391(b) as a
 10 substantial part of the events giving rise to this dispute occurred within this judicial district and
 11 because all defendants reside in this district pursuant to 28 U.S.C. §§ 1391(c) and (d).

13 FACTS

14 PLAINTIFF'S RIGHTS TO THE NAME AND MARKS EATRIGHT AND EAT RIGHT

15 6. Plaintiff Eat Right Foods produces and sells organic health food products and
 16 related goods and services. Specifically, Eat Right Foods makes and sells products that are free
 17 of genetically modified organisms (“GMOs”) and genetically engineered (“GE”) ingredients.
 18 Additionally, Eat Right Foods avoids the use of highly processed ingredients or food additives,
 19 such as hydrogenated oils, gums, sugar alcohol, refined sugars, or added yeast. Eat Right Foods
 20 also avoids use of ingredients that contain known allergens.

21 7. Eat Right Foods also makes and sells products that are variously gluten free,
 22 wheat free, dairy free, egg free, nut free, or soy free to accommodate individuals with certain
 23 health conditions such as intolerance to dairy products or gluten.

24 8. Eat Right Foods’ health food products are currently available for sale in the
 25 United States, including within the state of Washington.

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1 9. Beginning in 2001, Eat Right Foods used the trademark EAT RIGHT on food
2 products. Since 2003, Eat Right Foods has used the trademark EATRIGHT on food products.
3 Eat Right Foods has invested in advertising and marketing in the United States to promote and
4 raise consumer awareness of the brands EAT RIGHT and EATRIGHT.

5 10. Consumers have come to know and rely on the EATRIGHT and EAT RIGHT
6 trademarks as an indication of Eat Right Foods' high quality health-food, organic, GMO-free,
7 and GE-free products.

8 11. Consumers have also come to recognize the brands EATRIGHT and EAT RIGHT
9 as an indicator of high quality health-food products available from Eat Right Foods that avoid
10 highly processed ingredients or food additives, such as hydrogenated oils, gums, sugar alcohol,
11 refined sugars, or added yeast.

12 12. Consumers have also come to recognize the brands EATRIGHT and EAT RIGHT
13 as an indicator of high quality health-food products available from Eat Right Foods that are
14 variously gluten free, wheat free, dairy free, egg free, nut free, or soy free to accommodate
15 individuals with certain health conditions such as intolerance to dairy products or gluten.

16 13. Plaintiff Eat Right Foods owns United States Trademark Registration No.
17 3,045,314 ("the '314 registration") listing the trademark EATRIGHT on the Principal Register
18 for goods in class 30, including goods with the following description: "organic and allergy
19 sensitive cakes and cookies." A true and correct copy of the '314 Registration is attached to this
20 complaint as Exhibit A.

21 14. The '314 Registration is prima facie evidence of Eat Right Foods' ownership of
22 the trademark EATRIGHT and prima facie evidence of the validity of the trademark
23 EATRIGHT. The '314 Registration is also prima facie evidence that Eat Right Foods has the
24



1 exclusive right to use the trademark EATRIGHT and any confusingly similar names or
2 trademarks in connection with the listed food products and similar or related goods and services.

3 15. The rights provided to Eat Right Foods by virtue of the '314 Registration,
4 including Eat Right Foods' exclusive right to use the trademark EATRIGHT, have become
5 uncontested pursuant to 15 U.S.C. § 1065.

6 16. Plaintiff Eat Right Foods owns United States Trademark Registration No.
7 3,694,692 ("the '692 Registration") listing the trademark EATRIGHT on the Principal Register
8 for goods in class 5, including goods with the following description: "medicated confectionery,
9 food preparations adapted for medical purposes." A true and correct copy of the '692
10 Registration is attached to this complaint as Exhibit B.

12 17. The '692 Registration is prima facie evidence of Eat Right Foods' ownership of
13 the trademark EATRIGHT and prima facie evidence of the validity of the trademark
14 EATRIGHT. The '692 Registration is also prima facie evidence that Eat Right Foods has the
15 exclusive right to use the trademark EATRIGHT and any confusingly similar names or
16 trademarks in connection with the listed food products and similar or related goods and services.

18 18. Plaintiff Eat Right Foods owns United States Trademark Registration No.
19 3,694,693 ("the '693 Registration") listing the trademark EATRIGHT on the Principal Register
20 for goods in class 29, including goods with the following description: "snack mix consisting
21 primarily of processed fruits, processed nuts and/or raisins; organic nut and seed-based snack
22 bars; fruit-based snack food; fruit-based organic food bars; fruit-based organic food bars, also
23 containing nuts and seeds." A true and correct copy of the '693 Registration is attached to this
24 complaint as Exhibit C.

25 19. The '693 Registration is prima facie evidence of Eat Right Foods' ownership of
26 the trademark EATRIGHT and prima facie evidence of the validity of the trademark



EATRIGHT. The '693 Registration is also *prima facie* evidence that Eat Right Foods has the exclusive right to use the trademark EATRIGHT and any confusingly similar names or trademarks in connection with the listed food products and similar or related goods and services.

20. Beginning in 2004 and continuing until about February 2013, Defendant Whole Foods sold products produced by Eat Right Foods and sold under the trademark EATRIGHT. A portion of these products were distributed to Whole Foods through Eat Right Foods' independent distributor located within this judicial district.

21. Since at least as early as 2004, Defendant Whole Foods has known of Plaintiff Eat Right Foods' exclusive rights to the name and trademark EATRIGHT. And since at least as early as 2004, Defendant Whole Foods was aware of the goodwill associated with the name and trademark EATRIGHT.

DEFENDANTS' INFRINGING ACTIVITY

22. Defendant Whole Foods has offered certain food products for sale under a trademark confusingly similar to EATRIGHT. Specifically, Whole Foods sold health food products, such as produce, bulk foods, prepared foods, and cereal-based products such as granola, under the trademark EATRIGHT or confusingly similar names and trademarks. Photographs showing examples of Defendants' use of the trademark EATRIGHT or confusingly similar names and trademarks are attached to this Complaint as Exhibits D and E.

23. Products offered for sale and sold by Whole Foods under the trademark EATRIGHT or confusingly similar names and trademarks are not authorized by Plaintiff Eat Right Foods.

CAUSES OF ACTION

COUNT ONE—TRADEMARK INFRINGEMENT

24. Plaintiff Eat Right Foods incorporates the allegations of paragraphs 1-23.

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25. Defendants' conduct as alleged herein constitutes direct or indirect trademark infringement in violation of 15 U.S.C. § 1114.

26. Eat Right Foods has been injured and has suffered irreparable harm as a direct result of Defendants' trademark infringement and unless enjoined by this court, Eat Right Foods will continue to suffer irreparable harm. Defendants have been unjustly enriched by their appropriation of the trademark EATRIGHT and EAT RIGHT.

COUNT TWO—FALSE DESIGNATION OF ORIGIN

27. Plaintiff Eat Right Foods incorporates the allegations of paragraphs 1-26.

28. Plaintiff Eat Right Foods owns common law and statutory rights in the name and trademark EATRIGHT and EAT RIGHT. Consumers of health food products have come to associate the name and trademark EATRIGHT and EAT RIGHT with Plaintiff Eat Right Foods.

29. Defendants' conduct as alleged herein directly or indirectly creates a false designation of origin of Defendants' goods in violation of 15 U.S.C. § 1125(a), irreparably harming the reputation and goodwill associated with Plaintiff's trademarks EATRIGHT or EAT RIGHT, and unjustly enriching Defendants.

COUNT THREE—UNFAIR COMPETITION

30. Plaintiff Eat Right Foods incorporates the allegations of paragraphs 1-29.

31. Defendants' infringing conduct as alleged herein constitutes an unfair or deceptive practice in trade in violation of Washington State's Consumer Protection Act, RCW 19.86.10 *et. seq.*

32. Consumers in this state have a legitimate interest in accurate information concerning the source, origin, or sponsorship of goods and services sold, offered for sale, and used in this state. Defendants' infringing conduct as alleged herein is likely to cause confusion

as to the source, origin, or sponsorship of goods and services sold or used in the state of Washington.

33. Defendants' violation of the Washington State Consumer Protection Act has caused irreparable harm and unless enjoined by this court, will continue to cause irreparable harm.

PRAYER FOR RELIEF

Wherefore, plaintiff Eat Right Foods requests the following relief from this Court.

A. A permanent injunction, prohibiting any further use by Defendants of the mark EATRIGHT or EAT RIGHT, alone or in combination with any other words, characters, or logos, on or in connection with any goods or services;

B. A permanent injunction, prohibiting any further use by any Defendant of the trademark EATRIGHT, including any confusingly similar names and marks, on any goods in classes 30, 5, and 29.

C. The destruction of inventory and removal from distribution of any food products or labels for food products marked with the name or trademark EATRIGHT, EAT RIGHT, EATRIGHT AMERICA, or EAT RIGHT AMERICA, or any confusingly similar name or trademark, including the supply of pertinent documentation and statements from Defendants attesting to said destruction of inventory and removal from distribution;

D. Damages for trademark infringement and false designation of origin pursuant to 15 U.S.C. § 1117 in an amount no less than Defendants' gross revenue earned in connection with their sale of infringing products in association with the marks EATRIGHT, EAT RIGHT, EATRIGHT AMERICA, EAT RIGHT AMERICA or any confusingly similar name or trademark;

E. Damages for unfair competition under Washington State's Consumer Protection Act, RCW 19.86.10 *et. seq.*

F. Attorneys fees and costs under any applicable rule or statute;

G. Treble damages for willful infringement; and

H. Such other further relief as the court may deem just and proper.

JURY DEMAND

Eat Right Foods requests a trial by jury.

DATED this 3rd day of December, 2013.

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s/ Lawrence D. Graham

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Int. Cl.: 30

Prior U.S. Cl.: 46

United States Patent and Trademark Office

Reg. No. 3,045,314

Registered Jan. 17, 2006

TRADEMARK
PRINCIPAL REGISTER



EAT RIGHT FOODS LIMITED (NEW ZEALAND
CORPORATION)
7 KOTUA PLACE STOKE
NELSON, NEW ZEALAND

FOR: ORGANIC AND ALLERGY SENSITIVE
CAKES AND COOKIES, IN CLASS 30 (U.S. CL. 46).

FIRST USE 8-1-2001; IN COMMERCE 10-1-2001.

OWNER OF NEW ZEALAND REG. NO. 676367,
DATED 10-2-2003, EXPIRES 10-2-2010.

THE COLOR(S) GREEN, GOLD AND WHITE IS/
ARE CLAIMED AS A FEATURE OF THE MARK.

THE COLOURS GREEN AND GOLD APPEAR AS
A RECTANGULAR BACKGROUND ON WHICH
WHITE LETTERING IS PLACED.

SER. NO. 78-481,574, FILED 9-10-2004.

MICHELLE S. WISEMAN, EXAMINING ATTOR-
NEY

United States of America
United States Patent and Trademark Office



Reg. No. 3,694,692 EAT RIGHT FOODS LIMITED (NEW ZEALAND LIMITED LIABILITY COMPANY)
Registered Oct. 13, 2009 7 KOTUA PLACE
NELSON, NEW ZEALAND

Int. Cl.: 5 FOR: MEDICATED CONFECTIONERY, FOOD PREPARATIONS ADAPTED FOR MEDICAL PURPOSES, IN CLASS 5 (U.S. CLS. 6, 18, 44, 46, 51 AND 52).

TRADEMARK FIRST USE 8-1-2001; IN COMMERCE 10-1-2001.
PRINCIPAL REGISTER OWNER OF NEW ZEALAND REG. NO. 676368, DATED 10-2-2003, EXPIRES 3-27-2010.

THE COLOR(S) GREEN, YELLOW AND WHITE IS/ARE CLAIMED AS A FEATURE OF THE MARK.

OWNER OF U.S. REG. NO. 3,045,314.

THE MARK CONSISTS OF A RECTANGULAR BACKGROUND WHICH IS IN THE COLORS GREEN AND YELLOW WITH THE WORDING "EATRIGHT" APPERAING IN WHITE.

SEC. 2(F).

SER. NO. 77-470,886, FILED 5-9-2008.

EDWARD NELSON, EXAMINING ATTORNEY



David J. Kappos

Director of the United States Patent and Trademark Office

United States of America
United States Patent and Trademark Office



Reg. No. 3,694,693 EAT RIGHT FOODS LIMITED (NEW ZEALAND LIMITED LIABILITY COMPANY)
Registered Oct. 13, 2009 7 KOTUA PLACE
NELSON, NEW ZEALAND

Int. Cl.: 29 FOR: SNACK MIX CONSISTING PRIMARILY OF PROCESSED FRUITS, PROCESSED NUTS AND/OR RAISINS; ORGANIC NUT AND SEED-BASED SNACK BARS; FRUIT-BASED SNACK FOOD; FRUIT-BASED ORGANIC FOOD BARS; FRUIT-BASED ORGANIC FOOD BARS, ALSO CONTAINING NUTS AND SEEDS, IN CLASS 29 (U.S. CL. 46).

TRADEMARK
PRINCIPAL REGISTER

FIRST USE 8-1-2001; IN COMMERCE 12-3-2002.

OWNER OF NEW ZEALAND REG. NO. 789065, DATED 11-13-2008, EXPIRES 5-12-2018.

THE COLOR(S) GREEN, YELLOW AND WHITE IS/ARE CLAIMED AS A FEATURE OF THE MARK.

OWNER OF U.S. REG. NO. 3,045,314.

THE MARK CONSISTS OF A RECTANGULAR BACKGROUND WHICH IS IN THE COLOURS GREEN AND YELLOW AND THE WORDING "EATRIGHT" APPEARING IN WHITE.

SEC. 2(F).

SER. NO. 77-471,111, FILED 5-10-2008.

EDWARD NELSON, EXAMINING ATTORNEY



David J. Kappos

Director of the United States Patent and Trademark Office



Exhibit D



Exhibit E